(4)

No. 09-930

JUN 4 - 2010

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK,

Petitioners,

—against—

WADE F.B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners' Reply Brief

The Conservancy Respondents' Brief in Opposition is marred by a number of inaccurate statements of material facts and omissions of relevant law. This reply brief is respectfully submitted to correct those errors.

MATERIAL FACTUAL ERRORS IN RESPONDENTS' STATEMENT OF THE CASE

I. *Ownership and Control of Armory.* Respondents state on page 1 of their brief that "the Armory has always been publicly owned and controlled." That assertion is incorrect and comes directly from the challenged state legislation drafted by the Conservancy's private lawyers to obtain favored treatment for their client. The Armory was actually built by private funds and at the time of the disputed state legislation was owned by the Trustees of the Armory, a non-governmental body holding the land and building for the public purposes of the Seventh Regiment. (Appendix p 10a)

II. *Volunteer Militia Tradition.* The Seventh Regiment has not "always been an arm of the State of New York," as incorrectly claimed by the Conservancy respondents (Resp. Br. p 1). The Regiment was organized in 1824 as an independent private volunteer militia organization (Appendix 9a-10a). In recent times its military functions have been subject to state supervision, but the Regiment also continues to carry on its historic character and proud tradition as a privately organized volunteer body of citizen soldiers.

III. *Armory Funding of Conservancy Programming.* The challenged state legislation does not restrict the Conservancy's use of Armory rental income to "the building's rehabilitation" as claimed in Respondent's brief (Resp. Br. p 2). The legislation explicitly allows the Conservancy to use those proceeds for "programming" and for "activities of the lessee or subsequent lessee with respect thereto." Legislation § 39(b). (Appendix 35a). [This allocation of the Armory's rental income to the private Conservancy group after it was denied for many years to the Seventh Regiment for building maintenance is one of Petitioners' objections to the challenged state legislation.]

IV. *Restrictions on Veterans' Access.* Respondents' description (Resp. Br. pp 2-3) of the restriction imposed in the state legislation on allowing veterans associations to hold meetings in the Armory wholly omits the most important limitation, which makes such applications futile. The condition for use by veterans groups is not simply "provided that such use does not interfere with the use by the lessee. . ." but also includes the following crucial limitation (omitted from Respondents' brief): "provided that such use does not interfere with the use by the lessee or the manager pursuant to the terms of the management agreement, including any use by third parties contracted for under subparagraph (ii) of this paragraph." (Legislation § 3(i) (Emphasis added.)) (Appendix 33a).

Subparagraph (ii) of the disputed state legislation allows commercial operators to use the Veterans Room and other historic Regimental rooms for full-time restaurants, cocktail lounges and corporate reception areas—automatically blocking

any veterans' group from using those key Armory spaces for meetings, programs or social gatherings. This *proviso* is what makes any veterans' group application for use of these spaces futile. The only space actually available for their use are the two small offices on the top floor of the Armory —not the Veterans Room, any of the Regimental rooms, or any of the Company rooms on the main and second floors (See Appendix, 40a and 42a [floor plans and lease]).

MATERIAL ERRORS OF LAW IN RESPONDENTS' LEGAL ARGUMENT

I. Property Interest

The Conservancy Respondents urge the narrowest possible interpretation of what is a "property interest" to provide Article III standing. Their argument demonstrates the need for this Court to settle the meaning of "property interest" to clarify standing to challenge an allegedly unconstitutional taking.

Petitioners argue that "property interest" should be broadly defined for standing purposes—in this case also including property use and a "recreational right" as well as a "liberty interest." (Petition, p 30)

The Petitioners' property interest in the Armory is rooted in multiple associations and involvement with the Seventh Regiment, affiliated groups, and individual veteran's regular use of the Armory itself[1].

[1] Respondents' brief asserts that the activities of Fitzgerald and Wells as officers of Seventh Regiment support

Respondents' only Supreme Court authority offered to support a narrow view of "property interest" is *Andrus v. Allard*, 444 U.S. 51, 64 n21 (1979) (Resp. Br. p 6).

Andrus v. Allard involved a dispute over the right to sell eagle feathers that were lawfully in Plaintiffs' possession. Respondents have selectively quoted three lines of dicta from the middle of a footnote in that case to support their assertion that Petitioners do not have legally cognizable standing. Respondents do not disclose that the Court actually upheld Article III standing for the Plaintiffs in that case. The full text of the cited footnote reads as follows:

> 21. Although this argument appears to have been cast in the District Court in terms of economic substantive due process, before this Court appellees have used the terminology of the Takings Clause.
>
> The Secretary has raised the question of appellees' standing to assert a takings claim with respect to their artifacts. He asserts that appellees have not clearly stated that they acquired their property interest in the bird artifacts before the sales ban came into force.

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organizations are "new allegations, which are not in the complaint." (Resp. Br. p 7) However, the District Court itself recognized that the complaint asserts that Fitzgerald and Wells have a property interest in the Armory "as representatives of its successor organizations, including its Historical Society." (Appendix 17a). The specific details of Petitioners' activities as representatives of these successor organizations were set forth in Petitioners' brief on appeal as an "offer of proof" to help that court better understand the nature of these related regimental organizations (See Appellants' Second Circuit brief at page 26, footnote 4).

> If they have not, the Secretary argues, then the "value of any artifacts purchased by appellees *after* the effective date of the Act had already been diminished by the applicability of the Act." Brief for Appellants 30. This contention is misplaced. Even assuming that appellees have not sufficiently alleged pre-effectiveness possession, they have standing to urge their constitutional claim. Because the regulation they challenge restricts their ability to dispose of their property, appellees have a personal, concrete, live interest in the controversy. See *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The timing of the acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold. Of course, there is no standing to assert a takings claim by those who are merely employed in selling artifacts owned by others. All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself, suffices to give them standing to litigate their interest in the construction of the statutes.
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> (444 U.S. 51 at fn21) (Emphasis in original.)

Petitioners here do not claim they face any risk of criminal prosecution for exercising their property interests, but they do stress that property interests come in many shapes and forms—including their interest in use of the Armory for Seventh Regiment-related activities prior to the passage of the state legislation, and that the state legislation in this case took away their prior right to use the

Armory. Such use included exercise of responsibilities as officers of Regiment-affiliated organizations; active military service; planning for a military history museum in the Armory; participation in veterans' dinners and gatherings in the Veterans Room; plus the liberty interests and association rights of meeting with other veteran colleagues on the premises; as well as recreational and aesthetic enjoyment of the building's landmarked interior spaces—now closed to them to make way for high-priced civilian dinner parties, receptions, and cocktail gatherings. Depriving them of their prior uses of the property created a personal, concrete, live interest in the controversy.

II. Right of Access

Respondents assert that Petitioners "do not and cannot argue that the challenged statute violates their rights 'on its face.'" (Resp. Br. p 10) That assertion is incorrect—the precise basis for Petitioners' claim that they have been denied their statutory right of access to the Armory is that the challenged statute on its face excludes veterans from all spaces to be used by third parties "contracted for under subparagraph (ii) of this paragraph"—i.e., for restaurant, cocktails and receptions. (See discussion above.) The statute effects a lock-out of veterans organizations from the historic Regimental and Company rooms on the Armory's main and second floors, making any application for their use by veterans groups without charge "futile."

Respondents cite and quote *ICC v. Appleyard* in support of their claim that Petitioners have suffered no injury since they have not actually

applied for a permit and been turned down (*ICC v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1979) (Resp. Br. 9-10)).

However, *Appleyard* goes further than that and holds that an alternative ground for suit is when a permit application would be "futile":

> Appleyard concedes that Congress may require permits for interstate motor carriers. Since he does not attack the statute as unconstitutional on its face, we cannot presume that a request for a permit would be futile. Until he has shown that he cannot obtain a permit under the existing regulations, he has suffered no legally cognizable injury from this injunction.
>
> (513 F.2d 575, at 577)

Here the futility is created by the statute itself in closing the doors to the Armory's historic spaces to all veterans in order to convert the spaces to commercial restaurant use.

CONCLUSION

This Court should make clear that, properly applied, the relevant cases on Article III standing fully support the standing of Petitioners to be heard on the constitutionality of the State's transfer of the National Historic Landmark Seventh Regiment Armory from use by military veterans and veterans organizations to a pre-selected private organization.

This case is about constitutional access to justice, which should be deprived only on compelling policy grounds and not lightly denied to the citizen-soldiers who have risked their lives fighting to preserve that very constitutional value for all citizens.

Respectfully submitted,

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